IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1051

PARIS ADULT THEATRE I, ET AL,
*Petitioners,*

v.

LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, ET AL,
*Respondents.*

**On Writ Of Certiorari From The Supreme Court of Georgia**

## RESPONDENTS' BRIEF

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**On Writ Of Certiorari From The Supreme Court of Georgia**

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## RESPONDENTS' BRIEF

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## OPINIONS BELOW

The Order of the Trial Judge in the Superior Court of Fulton County is not reported and is found on pages 33 and 34 of the Appendix herein. The decision of the Supreme Court of Georgia and the Order denying the Motions for a Rehearing are found on pages 1 through 5 and 14 of the Appendix, respectively. The decision of the Supreme Court of Georgia is reported at 228 Ga. 343, 185 S.E.2d 768 (1971).

## QUESTIONS PRESENTED

1. The two (2) motion picture films which are the subject matter of these proceedings, and determined by the Supreme Court of Georgia to be obscene, are obscene in the Constitutional sense and are therefore not protected expression under the First Amendment of the United States Constitution.

2. The determination and judgment of the Georgia Supreme Court finding each of the films to be obscene and "hard core pornography" does not violate Petitioner's rights to procedural and substantive due process required by the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. The procedure employed in the adversary hearing was proper and consistent with the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

4. Whether the display of any sexually oriented films in a commercial threatre, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the films to juveniles, is constitutionally protected.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the Code of Georgia, § 26-2101, are found in Appendix D of the Petition for a Writ of Certiorari.*

## STATEMENT OF THE CASE

Respondents filed a Complaint in the Fulton Superior Court against Paris Adult Theatre I and Paris Adult Theatre II alleging that Defendants were exhibiting and showing to the general public for an admission charge a 16-millimeter motion picture film entitled "It All Comes Out In The End," in one theatre, and a 16-millimeter motion picture film entitled "Magic Mirror" in the other, each of which were alleged to be obscene within the definition of Georgia Code Section 26-2101 and their exhibition prohibited by that section. (A-21, 38)

In each of the cases Respondents demanded that a Rule Nisi issue; that, after a hearing upon the question and issue of obscenity, each of the films be declared obscene and subject to seizure; and, that the Defendants be temporarily and permanently enjoined from exhibiting the said films within the jurisdiction of the Court. Respondents further prayed for a temporary injunction, temporarily restraining and enjoining Defendants from concealing, destroying, altering or removing the motion picture films from the jurisdiction of this Court. (A-38, 39, 40). A temporary injunction was granted by the Court, and the Defendants were further ordered to have one (1) print each of the films, as they were exhibited on the 28th day of December, 1970, in Court on the 13th day of January, 1971, together with the proper equipment for viewing the same. (A-40, 41)

On the 13th day of January, 1971, the films were produced by Defendants after one of the Defendants served had been held in contempt for refusing to furnish the films on the grounds to do so might incriminate him. (A-48)

The parties stipulated and agreed to waive a jury trial and a preliminary hearing, and stipulated that the judg-

ment and order entered by the Trial Judge would be a Final Judgment and Order in each case. (A-89)

The parties further stipulated that certain photographs which were taken shortly before the hearing, correctly portrayed the outside of Paris Adult Theatre I and Paris Adult Theatre II as they existed on December 28, 1970, with the exception of the titles therein exhibited.

Each of the films were exhibited to the Trial Court. (A-50)

Evidence revealed that the theatres carried the legend on the outside that the films were for "Adults Only"; and, that "You Must Be 21 And Able To Prove It. If Viewing The Nude Body Offends You, Do Not Enter." (A-84, 85)

Ira W. Brown testified that he viewed the motion picture "It All Comes Out In The End" at the Paris Adult Theatre on December 28, 1970, and paid an admission charge of Three and No/100 ($3.00) Dollars to enter the theatre. (A-50)

Mr. Brown further testified that there was nothing on the outside that would indicate that acts of fellatio, cunnilingus or group sexual intercourse would be exhibited in that film. (A-52)

Evidence further revealed that no legend or other type of warning was exhibited outside the theatre which would forewarn the general public as to the contents of the film entitled "Magic Mirror." (A-57)

Mr. C. R. Little testified that he viewed the film "Magic Mirror" in its entirety on December 28, 1970; and that nothing was exhibited on the outside of the theatre that warned him what the contents of the film would be, other than the fact that adult movies were being shown in the

theatre. There was nothing on the outside of the theatre that indicated or suggested that acts of fellatio or cunnilingus or other erotica were contained in the films so exhibited. (A-57, 58) Mr. C. R. Little was then asked if in his opinion the film "Magic Mirror" had any social redeeming value, but he was not allowed to answer because of defendant's objection that Mr. Little had not been qualified as an expert. (A-58)

At the conclusion of the evidence the Trial Court took under advisement Motions to Dismiss filed by Respondents and subsequently did sustain the said Motions and dismiss Respondents' Complaint. (A-33, 34) This judgment was reversed by the Supreme Court of Georgia on November 5, 1971, after each Justice viewed each film in its entirety (A-5) and petitions for rehearing were denied on November 18, 1971. (A-1, 14)

## IT ALL COMES OUT IN THE END

The film begins by showing two males as they leave a building, get into a convertible and drive down the street. Then there is a scene which shows several women's garments lined up on the floor in an apartment hallway, then the scene returns to the convertible as the credits come onto the screen showing the title of the film, "IT ALL COMES OUT IN THE END."

The opening scene, after the credits, shows two completely naked females fondling and caressing each other. The next scene cuts back to the two men in the automobile, and then returns to the two females who are now seated on a bed. (The two females are completely naked, and they are fondling and caressing each other.) The scene then shifts back to the two males riding in the automobile, and then returns to the two females on the bed. (One fe-

male is kissing the other female around her pubic area.) The scenes continue to shift back and forth between the two males in the automobile and the two females on the bed. One female is shown as she performs the act of cunnilingus upon the other female. The females then change positions, and simultaneous acts of cunnilingus are depicted. (One female performs cunnilingus upon the other female as the other female simultaneously performs cunnilingus upon the first female.) The scenes then continue to shift back and forth between the two males riding silently in the automobile and the two females writhing in lesbianic activities on the bed. The two females are now moaning and groaning in sensual pleasure: they continue to stimulate each other until they each sustain a sexual climax and then relax on the bed satiated by their efforts. One female then decides that she needs a sexual change for awhile, and the other female suggests that what she needs is a man instead of a woman for a sexual partner. The two females then decide that they will go out and find some men. The scene then changes to a yacht club waterfront where the two girls are searching for companionship. One of the females, female no. 1, goes down to the dock area and is sitting on a yacht. The scene now switches to the two men in the car as they arrive in the dock area of the yacht basin. The two males leave the automobile and walk away in opposite directions. One of the males, male no. 1, then encounters the female sitting on the yacht. They strike up a conversation and she invites him to her apartment for coffee. The next scene shows the male and the female in her apartment. The other female, female no. 2, now returns to the apartment; she is accompanied by another male, who is male no. 2, the companion of male no. 1. The two males are the same two males that appeared in the automobile earlier. The

scene then shifts to the kitchen where female no. 2 and male no. 2 are talking about female no. 1 and male no. 1. They then return to the living room. The scene then changes to a bedroom as female no. 1 is showing male no. 2 the view from the window. Male no. 2 begins to undress. Female no. 1 resists and male no. 2 rips off her clothes. The scene then changes back to the living room and depicts female no. 2 performing a dance for male no. 1. The scene then shifts back to the bedroom where male no. 2 is forcing female no. 1 to consort with him on the bed. He is shown kissing and caressing the breasts and pubic area of the female. The scene then shifts back to the living room where female no. 2 is completely undressing before male no. 1. She continues to dance provocatively before him. The scene then shifts back to the bedroom as the unwilling female no. 1 continues to resist the physical demands of male no. 2. The scene in the bedroom then shows female no. 1 as she performs fellatio upon male no. 2. The scene continues to shift back and forth between the bedroom and the living room. The next scene shift shows the couple in the bedroom engaged in sexual intercourse in the male above position. The scene then returns to the living room to where female no. 2 is shown undressing male no. 1. At this point both the couple in the living room and in the bedroom are completely naked. The next scene shows female no. 2 as she performs fellatio upon male no. 1, and the scene ends as the male experiences a sexual climax. The scene shifts back to the bedroom where the other couple is engaged in sexual intercourse in the male above position. The scene in the bedroom then depicts the female performing fellatio on the male. The film again shows the couple in the bedroom engaged in sexual intercourse in the male above position, until they experience a mutual sexual climax and embrace.

The scene then shows female no. 2 talking to male no. 2. The two males patch up the argument that they have had previously and renew their homosexual friendship. The next scene shows the two females writhing in lesbianic estacy on the bed, their legs intertwined, rubbing their genitals together. The next scene shows a prolonged orgy between both couples on the bed. During this orgy both males are depicted as they perform cunnilingus upon the females. Then, as one male performs cunnilingus upon his partner, the other couple is engaged in sexual intercourse. (In the male above position). The scene then changes again to the waterfront as the film ends.

## MAGIC MIRROR

The motion picture begins with a scene depicting a female browsing in an antique store. The female is conversing with the shop proprietor concerning the prices of the merchandise. She shows an interest in a particular mirror and is told that the mirror has magical powers. The female purchases the mirror and the next scene opens in the female's apartment. She is having difficulty operating her TV set. A TV repairman arrives and diagnoses the problem as the set being unplugged. She goes into the bedroom to obtain the money to pay the TV repairman and glances into her newly acquired mirror. There is a flashback, as her image in the mirror fades, and the next scene shows the female completely nude and the TV repairman completely nude as they apply shaving cream to each other's body. The next scene switches camera shots back and forth as the cream is being applied to the female's breasts and pubic area and to the male's pubic area. This is followed by a scene showing the male and the female applying shaving cream to their entire

bodies. The male then reclines on his back on the floor, and the female mounts him in the female above position as the film shows the male fondling and caressing the female's breasts. The next scene shows them horizontally sliding up and down on each other. After several minutes of this they change to the male above position and engage in sexual intercourse. The next scene shows them writhing and embracing. The following scene shows them engaged in simultaneous acts of fellatio and cunnilingus (the female performs fellatio on the male while simultaneously the male performs cunnilingus upon the female). The scene then fades back from the flashback into the female's bedroom as she pays the TV repairman some money. The television repairman then leaves the apartment and the scene changes—a knock is heard at the door and the female answers. Two other females enter the apartment: they are circulating a petition. They represent the anti-smut society (ASS) and ask the original female to sign the petition. The two new females then admire the antique mirror; and, as they gaze into it, the film fades to another flashback. The next scene shows the two new females completely nude reclining on the floor and passionately embracing. One female mounts the other in the female above position and they caress and fondle each other. The next scene shows the two females as they embrace and kiss each other's breasts and pubic areas. One female is then viewed as she performs cunnilingus upon the other female, as shown by thrusting her head and mouth between the widespread legs of the other female; while, at the same time, the other female performs cunnilingus upon her. They then change positions and simultaneous cunnilingus is performed again. The two females then cross legs with each other, rub their genital areas together, and gyrate while in this position. The next scene depicts one female

as she performs cunnilingus upon the other, while the other massages her own breasts. The scene then fades back to the female's apartment and the two females that are gathering signatures for the petition are shown as they leave the apartment. The next scene is again in the female's apartment, where the original female and another male, who are both fully clothed, are practicing some dancing. (They are dressed in evening wear attire.) As they dance past the mirror they both stare into it and the scene begins the fade into a flashback. The next scene opens with two males and two females who are dancing. As they dance the females are disrobed by their male partners. The males are also disrobed by their female partners. At this point the four participants are completely naked as they then switch partners and continue to dance. Male no. 1 is shown as he performs cunnilingus upon female no. 1. Female no. 1 then performs fellatio upon male no. 1. They continue to dance for awhile; and, finally all four fall to the floor as both males perform cunnilingus upon their individual female partners. The couples are then shown as they engage in sexual intercourse with the females sitting in the laps of the males. At this point they all gather together on the floor and switch partners again. The scene that follows depicts one male performing cunnilingus upon a female, while, at the same time, the female performs fellatio upon the other male. A sexual orgy ensues between the four in which acts of cunnilingus and fellatio are performed between all parties simultaneously. The scene then shows sexual intercourse engaged in by both couples in the male above position. The film then depicts a sexual orgy in which acts of sexual intercourse, fellatio and cunnilingus are performed repeatedly and continuously. The scene then fades back to the female's apartment where the female and her male escort

are shown as they leave the apartment. The next scene shows female no. 1 asleep on the couch in her apartment. The front door opens and a male enters surreptitiously. (The room is completely dark except for a lighted table lamp.) The male finds the female's pocketbook on the table and begins to empty it. While doing this, he drops the pocketbook and the female awakes. He produces a revolver and forces the female to lie down as he binds her hands with rope and then instructs her to get her jewelry. At this point a policeman in uniform comes into the apartment and begins to apprehend the robber. At this point the female is shown reflected in the mirror as the scene begins to fade into a flashback. The next scene shows the robber and the policeman completely naked as they caress and fondle the completely naked female. The two men push each other away from the female. After a few minutes of this, the robber hits the policeman on the chin and knocks him out. The robber then embraces and caresses the female without the interference of the policeman. They then engage in sexual intercourse in close proximity to the unconscious policeman. At one point they are engaged in sexual intercourse in the female above position as the robber is lying across the policeman's body. After this the policeman begins to regain consciousness; and, as he comes to, the previous act is repeated and the policeman now begins to fondle and caress the female. The two males are then shown as they continue to fondle and caress the female; and the policeman is shown performing the act of cunnilingus upon the female, while at the same time the robber fondles and caresses the breasts of the female. The female is then shown as she performs fellatio upon one male and then the other. The policeman then caresses and licks and kisses the feet and toes of the female as the robber caresses and kisses her breasts. Then

the males change positions and the robber licks and kisses the feet of the female as the policeman fondles and caresses and kisses her breasts. The scene then fades back to the apartment of the female where a fight breaks out between the policeman and the robber. As they struggle together the policeman draws his revolver and shoots the robber in the stomach. Blood is seen gushing from the wound in the robber as it spills onto his clothes and onto the floor. The policeman then leaves to report to headquarters and the female then notices that the mirror has been broken in the struggle. This is the end of the film.

**1. THE TWO (2) MOTION PICTURE FILMS WHICH ARE THE SUBJECT MATTER OF THESE PROCEEDINGS, AND DETERMINED BY THE SUPREME COURT OF GEORGIA TO BE OBSCENE, ARE OBSCENE IN THE CONSTITUTIONAL SENSE AND ARE THEREFORE NOT PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.**

The photographs of the outside of Paris Adult Theatres I and II clearly established the total lack of forewarning to prevent potential intrusion into the privacy of unsuspecting adults who wish to avoid confrontation with erotic material. The modest legend on the exterior of the premises simply provided that the material "Is For Adults Only And You Must Be 21 And Able To Prove It. If Viewing The Nude Body Offends You—Please Do Not Enter." (A-85)

This legend would not forewarn the public; nor does it even suggest that the films in question depicted fellatio,

cunnilingus, sexual congress, lesbian activities or homosexuality. At most the legend would suggest that the films only portrayed and exhibited nude scenes and pictures, such as are contained in "girlie" magazines, which this Court has ruled are constitutionally permissible under the Doctrine of *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414 (1967), as explained and construed in *Milky Way Productions, Inc. v. Leary*, 305 Fed. Supp. 288, 293, affirmed 397 U.S. 98, 90 S.Ct. 817 (1970).

In the Supreme Court of Georgia, Petitioners contended that, because of the legend appearing outside the theatre, as hereinabove set forth, the exhibition of the films in this context is permissible; and, that the State cannot, without violating First Amendment Rights, constitutionally prohibit it.

They relied in support of this position upon the case of *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243 (1969), and other federal and state cases following it. *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410 (1971) and *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400 (1971), expressly limited the scope of *Stanley* and discredited the decisions which would so expand it. In *United States v. Reidel* this Court said:

> "He (Reidel) has no complaints about governmental violations of his private thoughts or fantasies, but stands squarely on a claimed First Amendment right to do business in obscenity and use the mails in the process. But *Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today. *Stanley* did not overrule *Roth* and we decline to do so now." 402 U.S. 351, 356.

The myriad of cases relied upon and cited by Petitioners in regard to this point clearly involved interpretation of different statutes, "girlie" magazines, and some motion picture films which are, in fact, borderline cases at the most, and the subject matter of which is in no way comparable to the motion picture films involved in this case.

For an example, Petitioners cite and rely heavily upon *Burgin v. South Carolina,* 178 S.E.2d 325, reversed 404 U.S. 806 (1971). The *Burgin* reversal was based upon *Redrup v. New York*. Counsel for the Petitioners in this case was also counsel for *Burgin*. On Page 12 of Petitioners' Petition for a Writ and Argument to this Court *Burgin* urged:

> "It seems perfectly clear that this Court in offering a workable solution for the lower Courts in obscenity litigation, civil or criminal, in rem or in personam, has restricted the determination of obscenity vel non to those materials depicting sexual activities." (Emphasis added)

The evidence in *Burgin* consisted of several "girlie" magazines. *Burgin* stated on Page 11 of his Petition for Writ of Certiorari:

> "These publications are indistinguishable from those involved in many of the decisions of the Supreme Court based upon the principles set forth in *Redrup v. New York,* 386 U.S. 767. Take for example, the materials found not obscene for willing adults in *Bloss v. Dykema,* 389 U.S. 278, as recently as June 1, 1970. *In neither is there any depiction of sexual congress.*" (Emphasis added)

The Petitions for Writ of Certiorari in *Burgin,* and the other cases cited and relied upon by Petitioners in this

case, themselves distinguish clearly between the material involved in this case and the other cases relied upon.

Since *Redrup v. New York* supra, this Court has reversed some thirty-three cases citing *Redrup* as its only authority. One notable exception has been *G.I. Distributors, Inc. v. New York*, 20 NY 2d 104, 281 NYS 2d, 795, cert. denied (389 U.S. 905, 88 S.Ct., 218 (1967).) *G.I. Distributors* came to this Court within a month after *Redrup* and immediately after the first thirteen (13) reversals. (June 12, 1967). *G.I. Distributors* involved sexual activity missing in the *Redrup* reversals to date and cited by Petitioner. The lower Court described the materials as follows:

> "The pamphlet contains 70 full page photographic reproductions including the covers. There is no text except for two pages of advertising data with reference to subscriptions for photographic prints, and the centerleaf containing advertising blurbs or "reviews" of two books, entitled "Kept Boy" and "Dial P for Pleasure". All of the photographs are of two or more young men, and in nearly all, in various stages of undress or nudity, engaged in attitudes of embracing, wrestling, spanking, beating or enforced disrobing of one of the young men."
>
> "Two of the photographs portray one young man manually soap-lathering the genitalia of the other. One portrays a young man trying to seize the genitalia of another. Two portray the young men in embracive posture consonant with and suggestive of an act of pederasty. There are three nude spanking scenes. There are several others depicting sadistic assaults. The disrobing and wrestling scenes are strongly suggestive of activity directed toward expo-

> sure or seizure of genitalia. These photographs in the context of the others in the pamphlet indicate that the pamphlet taken as a whole is designed to portray a full range of sexual behavior between young males from byplay to pederasty."

Clearly the films in the instant case go beyond any of the materials in the cases cited by petitioner and even beyond the materials in *G.I. Distributor's, Inc.* supra.

"Magic Mirror" and "It All Comes Out In The End" depict sexual congress in every manner and method known to man, and are clearly and easily distinguishable from the material involved in *Burgin* or in any of the other cases which were reversed by this Court, per curiam, citing *Redrup* as authority.

There is no pretext of social value present in the instant case. The plot of each film is only used to present continuous scenes of sexual activity. Both films are "patently offensive" and their "indecency speaks for itself." *Memoirs v. Massachusetts*, 383 U.S. 419, 86 S.Ct. 975 (1966). The films have no pretense of artistic value; they graphically depict acts of sexual intercourse, including various acts of sodomy and involve several participants in scenes of "orgy-like character". *Ginzburg v. U.S.*, 383 U.S. @ 463, 499, Fn3, 86 S.Ct. 942 (1966).

Petitioner insists that in light of the *Redrup* reversals any material, even if obscene, is protected unless one of the three significant factors in *Redrup* is present. However, a reading of *Redrup* and *Ginzburg, supra,* clearly puts this hypothesis to rest. In *Ginzburg* this Court said that pandering was the significant factor in tipping the scales in a "weak" prosecution.

> "They (Ginzburg) proclaimed its obscenity; and we cannot conclude that the Court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene despite the other evidence." 383 U.S. 463, 472.

*Redrup, supra,* pointed out that the Court was mistaken as to the materials involved; and there was no conduct on the part of the Defendant to support an affirmance of his conviction.

> "The Court originally limited review in these cases to certain particularized questions, upon the hypothesis that the material involved in each case was of a character described as "obscene in the constitutional sense," in *Memoirs v. Massachusetts,* 383 U.S. 413, 418, 16 L ed 2d 1, 5, 86 S.Ct. 975. But we have concluded that the hypothesis upon which the Court originally proceeded was *invalid,* and accordingly that the cases can and should be decided upon a common and controlling fundamental constitutional basis, without prejudice to the questions upon which review was originally granted. We have concluded, in short, that the distribution of the publications in each of these cases is protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, in personam or in rem."

In no manner does *Redrup* reverse *Roth.* If material is obscene, it is not constitutionally protected and can be regulated by the various States notwithstanding the conduct of the defendant in his commercial distribution of the material. All that the *Redrup* reversals mean is that particular material in each case is not obscene under *Roth,* absent a showing of some conduct on the part of the defendant to justify affirmance.

In the case of *Wisconsin v. Amato*, 49 Wis. 2d 638, 183 N.W. 2d 29, certiorari denied January 24, 1972, 30 L.Ed. 2d 751, rehearing denied, 31 L.Ed. 2d 257, the Supreme Court of Wisconsin held:

> "In support of their contention that the three (3) magazines here involved are, as a matter of law not obscene. Defendants describe the materials involved in several per curiam *'Redrup Reversals'*. While a few of these cases — notably *Central Magazine Sales Ltd. v. United States* (1967), 389 U.S. 50, 80 S.Ct. 235, 19 L.Ed. 2d 49, may have involved magazines bearing similarity to one of the magazines herein involved, the other cases dealt with books, films and other items bearing no resemblance to the instant materials."

The Court continued:

> "The Appellants contend that the decision in *Redrup* modifies the use and scope of the *Roth Memoirs Test*. They argue that magazines such as those involved in this case may not serve as a basis for obscenity prosecution unless it can be shown that: (1) They were sold to minors; or (2) They were so obtrusively displayed as to cause unwilling viewers to see them; or (3) They were pandered in the manner described in *Ginzburg*.
>
> We do not agree. *Redrup* is authority only for the proposition that the particular books and magazines there involved were not obscene. *We think that if the Redrup decision was intended to reverse the Roth-Memoirs Test, that obscenity is not constitutionally protected speech, the Court would have so stated in no uncertain terms.* (Emphasis Added)*

We conclude that *Redrup* is strictly limited to the question of obscenity of the specific materials there under consideration."

The Supreme Court of Georgia in its decision in this case, *Slaton v. Paris Adult Theatre*, 228 Ga. 343; 185 S.E. 2d 768, 769, held:

"As we view the holding in the *Reidel* case, it is dispositive of the Appellees' contention, and the ruling of the Trial Court that the showing of these films in a commercial theatre under the circumstances shown in this case is constitutionally permissible. The Defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theatre and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass through the front door of the Defendant's theatre and purchase a ticket to view the films and who certify thereby that they are more than twenty-one (21) years of age are willing recipients of the material in the same legal sense as were those in the *Reidel* case, who, after reading the newspaper advertisements of the material, mailed an order to the Defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the First Amendment."

Georgia Code Annotated 26-2101 is held to be constitutional and within the purview of the First and Fourteenth Amendments to the United States Constitution. *Gable v. Jenkins*, 309 Fed. Supp. 998, affirmed; 397 U.S. 592. The motion picture films here involved are clearly obscene in a constitutional sense, and they are not protected expression under the First and Fourteenth Amendments to the United States Constitution. Each of the said films offends every section of Georgia Code Section 26-2101.

## 2. THE DETERMINATION AND JUDGMENT OF THE GEORGIA SUPREME COURT FINDING EACH OF THE FILMS TO BE OBSCENE AND "HARD CORE PORNOGRAPHY" DOES NOT VIOLATE PETITIONER'S RIGHTS TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS REQUIRED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Theatres objected to all efforts by the Respondents to introduce evidence of the *Roth-Memoirs Tests* of Obscenity and should not be allowed to complain of the Trial Court's ruling. (A-58)

However, the authoritative judicial decisions do not require such evidence in all cases.

In *U.S. v. Groner* ____F.2d____No. 71-1091 CA-5 11-11-72 relied upon by Petitioner the Court said:

> "We are not prepared to go so far as to say that introduction of such evidence (expert) is necessary on *all* the elements of obscenity in *all* such cases."

The Court in *Groner* distinguishes *Kahm v. United States*, 300 F.2d 78 (5th Cir. 1962) by the materials involved in both cases. In *Kahm* the material was graced with no plot, no character development, and no exemplification of independent literary effort, while, the material in *Groner* possessed all the aforementioned attributes. *Kahm v. U.S., supra,* held that expert evidence was not required to sustain a conviction in a case where the jury does not have to weigh the literary, artistic or social values of a work against certain off color passages. The Court reasoned:

> "It is plain to us that when the jury was instructed by the trial court in language such as that approved by the Supreme Court in the *Roth* case, it was fully capable of applying those standards and that charge to the materials shown to have been mailed here. Nothing is more common than for a jury in a case involving charges of negligence, as for example negligent homicide, to determine whether the proven conduct measures up to the standards of a reasonably prudent man. We think it may fairly be said that no amount of testimony by anthropologists, sociologists, psychologists or psychiatrists could add much to the ability of the jury to apply those tests of obscenity to the materials here present."

The Court in *Kahm* was simply reiterating the rule laid down in *Roth* when this Court approved the following jury instruction:

> ". . . The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would

leave another segment, the scientific or highly educated or the so-called wordly-wise and sophisticated indifferent and unmoved . . .

"The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards." *Roth v. U.S.* 354 U.S. 476.

The motion picture films themselves are the highest and best evidence of what they contain. *U.S. v. Wild*, 422 Fed 2d 34; certiorari denied April, 1971, 9 Cr.L. 4046; *Womack vs. U.S.*, 111 U.S. app. D.C.8 294 F. 2d 204 (1961). In the case of *United States v. Robert Brown*, 328 Fed. Supp. 196, United States District Court, Eastern District of Virginia, Norfolk Division, decided June 9, 1971, the Court held at Page 199;

"The real issue in this case, of course, is whether these two (2) books are actually obscene. The Supreme Court has held, more than once, that obscenity is outside the scope of First Amendment protection." *** "Brown argues that this Court must acquit him because the government presented no expert testimony that the two (2) books are obscene. As author-

ity for this position Brown relies on *United States v. Klaw*, 350 Fed. 2d 155 (2d Cir. 1965), which does indicate some of the problems involved in determining questions of prurient interest and contemporary community standards. Specifically, the problems include 'how', 'by whom', and 'on what basis' these determinations are to be made. *Klaw*, however, is not controlling here for as the Second Circuit Court of Appeals subsequently pointed out, the particular facts in *Klaw* required such testimony. *United States v. Wild*, 422 Fed. 2d 34 (2d Cir. 1969). The two (2) books named in this indictment appear to be substantially different from the materials discussed in *Klaw*. *** Judge Lumbard stated in *Wild*, 'The question of obscenity can be disposed of merely by stating that these slides are unquestionably hard core pornography. *** There is no conceivable claim that these color slides have redeeming social value.*** Hard core pornography such as this can and does speak for itself.' 422 F.2d at 35-36. And in *Ginzburg v. United States*, 383 U.S. 463, 465, 86 S.Ct. 942, 944, 16 L.Ed. 2d 31, the Court said that in the cases in which it has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question."

See also *New York v. Abronovitz*, 310 N.Y. Supp. 2d 698, and *New York v. Buckley*, 320 N.Y. Supp. 2d 91.

Experts are not required for a successful prosecution. *United States v. 392 Copies of Magazine Entitled "Exclusive"*, 253 F. Supp. 485, 493 (D.C., 1966); *United States v. Davis*, 353 F. 2d 614, 615 (2d Cir. 1965), cert. den. 384 U.S. 953, 86 S.Ct. 1567; *People v. Finhelstein*,

111 N.Y. 2d 300, 306-307, 229 N.Y.S. 2d 367 (1962); *People v. Kirkpatrick*, 316 NYS 2d 37.

In *State v. Carlson*, 192 N.W. 2d 421 (1971), the Court held at Page 425:

> "There is no need for expert assistance for a jury to determine contemporary community standards and whether the film lacks social value. The films speak for themselves as evidence of their obscenity. No amount of testimony by psychoanalysts, psychologists or anthropologists would be any more reliable on the question of whether the films affront contemporary community standards than the opinion of the jurors in this case."

In the instant case, there was no jury determination; A jury was waived, and a judge made the determination. On appeal the trial judge was reversed. If expert testimony had been presented to the trial judge it is clear that such testimony would not have been binding on the Court. The trier of fact could disregard it entirely or give it such credence as he saw fit. *Boyd v. The State*, 207 Ga. 567, 63 SE 2d 394; *Clark v. The State*, 224 Ga. 311, 161 SE 2d 836. On appeal the Supreme Court of Georgia after viewing each of the films in their entirety, made an independent determination of obscenity, as it is required under the law to do. *Roth v. United States, supra*, 354 U.S. @ 497-498, 77 S.Ct. 1304; *Kingsley Intern. Pictures Corp. v. Regents*, 360 U.S. 684, 708, 79 S.Ct. 1362, 3 L. Ed.2d 1512 (1959); *Manual Enterprises v. Day, supra*, 370 U.S. 488, 82 S.Ct. 1432, 8L.Ed.2d 639; *Jacobellis v. Ohio*, 378 U.S. 184, 188, 190, 84 S.Ct. 1676, 12 L.Ed. 2d 793 (1964); *People v. Richmond County News, supra*, 9 N.Y. 2d p. 581, 216 N.Y.S. 370, 175 N.E.2d 682;

*People v. Fritch*, 13 N.Y.2d 119, 124, 243 N.Y.S. 2d 1, 5, 192 N.E.2d 713, 716 (1963). And like this Court in *Ginzburg v. United States*, supra the Supreme Court of Georgia looked only to the films themselves. This Court in *Ginzburg* said:

> "In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question." 383 U.S. 463.

And likewise, expert testimony would not be binding on the Appellate Court. *Gornto v. McDougall*, 336 F. Supp. 1372 (1972). The decision of obscenity is solely for the Court on appeal. In final analysis the Court must be the expert in assessing the dominant theme, prurient interest, community standards, and social redeeming value, of the material involved. This decision is solely for the Court and it may not permit the usurpation of that function by the "expert" or the jury. *Memoirs v. Massachusetts*, supra, 383 U.S. pp. 450, 462, 86 S.Ct. 958.

It seems that on one hand there must be an independent de novo determination of obscenity at every step of the judicial process. See *Childs v. Oregon*, 401 U.S. 1000, 91 S.Ct. 1248 and the finding jury or trial judge is meaningless; while on the other hand if the trial court finding is one of acquittal, petitioner insists the appellate courts are freed from the duty of finding obscenity *vel non*. *Gornto v. McDougall*, 336 F.Supp. 1372 (1972) fn4.

Petitioner relies on *Klaw v. U.S. supra*. However, "Klaw is a special kind of case from which no general rule can be deduced," and it must be limited to the sado-masochistic type of material there involved, which is aimed at the sexual deviant. In such a case expert testi-

mony may very well be required to demonstrate whether the material appeals to the prurient interest in sex of that deviant segment, which knowledge would not be within the experience of a jury or judge. *United States v. Wild, supra*; p. 35 *"People v. Kirkpatrick,* 316 N.Y.S. 2d 37 (1971).

In the case of *Evans Theatre Corporation, et al. v. Slaton,* 227 Ga. 377, certiorari denied November, 1971, the Court observed:

> "In *Jacobellis v. Ohio,* 378 U.S. 184 (84 S.Ct. 1676, 12 L.Ed 2d 793), in an opinion concurred in by two (2) Justices of the United States Supreme Court, it was stated that the 'contemporary community standards' by which they must determine the issue of the Federal constitutional rights of those convicted of crimes involving alleged obscene material were national standards. This opinion did not suggest that State courts must have evidence of national standards of decency before them in order to make a determination as to whether material is obscene. The United States Supreme Court in the *Jacobellis* case made its determination as to whether the film there reviewed was obscene under 'national' community standards by viewing the film itself."

Is Not The Supreme Court of Georgia Clothed With The Same Right, Authority And Responsibility To Make Such Determination By Viewing The Material Itself?

The *Evans* case involved the motion picture "I am Curious (Yellow)". By an equally divided Court, this Court affirmed, *Grove Press, Inc. et al. v. Maryland State Board of Censors,* 401 U.S. 480, 91 S.Ct. 966, which de-

cision declared the film "I am Curious (Yellow)" obscene.

In *Wisconsin v. Amato*, 49 Wis. 2d 638, certiorari denied January 24, 1972, 30 L.Ed.2d 751, rehearing denied 31 L.Ed.2d 257, also reported in 183 N.W. 2d 29, the Court held on Page 32:

> "The Appellants contend that in the absence of affirmative proof of 'contemporary community standards' through expert testimony, the State cannot prevail. Several cases are cited in support of this contention. However, the Appellants concede that some Courts have held that affirmative proof on the issue of community standards is not necessary in obscenity cases. However, they contend that the decisions are in the minority, most are pre-*Redrup* and in many of them there is a finding that the material involved is hard core pornography, that is, *material which depicts sexual activity*. We believe that the mere existence of the magazines here involved was sufficient without expert testimony to present a jury question. We conclude that expert testimony is not required."

What Appellant is now attempting to do is apply the dictates of *Jacobellis* and to make them a Constitutional requirement of the type of evidence to be presented to the jury. Respondent submits that this impossible requirement is a far cry from *Smith v. California*, 361 U.S. 147, where even the most liberal members of the Court advocated allowance of such evidence by way of defense.

The first and only comment on evidentiary proof is found in Mr. Justice Harlan's concurring opinion in *Smith v. California*, 361 U.S. 147, where, in discussing the trial court's exclusion of appropriately offered testimony

through duly qualified witnesses regarding "the literary and moral criteria by which books relevantly comparable . . . are deemed not obscene," he advocates the admission of expert testimony and states:

> The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process "using that term in its primary sense of an opportunity to be heard and to defend a . . . substantive right," *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 74 L Ed 1107, 1112, 50 S Ct 451, requires a State to allow a litigant in some manner to introduce proof on this score. While a State is not debarred from regarding the trier of fact as the embodiment of community standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier.

However, Mr. Justice Harlan there concludes by cautioning against imposing on the states the necessity of *proving* their case by the introduction of any particular kind of evidence:

> However, I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard. There are other ways in which proof can be made, as this very case demonstrates. Appellant attempted to compare the contents of the work with that of other allegedly similar publications, sold and purchased, and which received wide general acceptance. Where there is a variety of means, even though it may be considered that expert testimony is the most convenient and practicable

> method of proof, I think it is going too far to say that such a method is constitutionally compelled, and that a State may not conclude, for reasons responsive to its traditional doctrines of evidence law, that the issue of community standards, may not be the subject of expert testimony. I know of no case where this Court, on constitutional grounds, has required a State to sanction a particular mode of proof.

To require expert testimony as a constitutional requirement would usurp the appellate courts duty to independently apply the *Roth* standards. It would put the criminal process in this area in the hands of "experts." One Court in reviewing the trial court commented on the danger of experts:

> "It was evident that, while these witnesses for both defense and prosecution testified as experts, many of them viewed their roles as advocates. All but one or two had a prior conviction concerning the undesirability or desirability of legislation in this area, and their primary interest was either in attacking or defending it. "Having in most cases chosen their sides as moralists," as Murray Kempton said in reviewing the Report of the Presidential Commission on Obscenity, "they seemed to feel the need to present themselves as utilitarians and to give weight to dubious research, which as practical men, they would be embarrassed to claim as the basis for sound principle." *U.S. v. New Orleans Book Mart, Inc.* 328 F. Supp. 136 (1971).

It is axiomatic in our system of justice that judges and juries understand the law and can apply it to the facts without assistance from anyone — "expert" or not.

It must therefore logically follow that if the Supreme Court of the United States may, by considering the material alone, hold that certain material is constitutionally protected by the First Amendment, as the Court has so ruled in its many *Redrup* reversals, then the Supreme Court of Georgia, in like manner, may find, as a matter of law, that the material and films involved in this case are obscene and are not protected by the First and Fourteenth Amendments to the United States Constitution, without the assistance of expert testimony.

## 3. THE PROCEDURE EMPLOYED IN THE ADVERSARY HEARING WAS PROPER AND CONSISTENT WITH THE FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

After the motion picture films "It All Comes Out In The End" and "Magic Mirror" had been viewed in their entirety, Respondents filed a Complaint against Paris Adult Theatre I and II; and a Rule Nisi was issued by the Fulton Superior Court directing the Theatres to appear on a day certain in order that an adversary hearing could be held to determine the question of obscenity. The Theatres were required to produce one (1) print of each of the motion picture films and the proper equipment for exhibiting the same to the Court. They were restrained only from concealing, altering, mutilating or destroying the said films or removing them from the jurisdiction of the Court.

The procedure employed by the Respondents in this case is far more protective of the Constitutional rights of the Exhibitors than is the procedure in any of the cases

cited by the Theatres or suggested in the Petition for Writ of Certiorari. No restraint whatsoever is placed upon the exhibition of the motion picture films involved until after a hearing is had thereon and the Courts have determined that the material is in fact and in law obscene. Until this determination is made the Exhibitors are free to continue exhibiting the films, as was done in this case; and, therefore, the length of time between the filing of the Complaint and the hearing operates to no detriment to the Exhibitor at all.

This procedure was first established in this District in *Gable v. Jenkins*, 309 Fed. Supp. 998, United States District Court, Northern District of Georgia, Atlanta Division, affirmed 90 S.Ct. 1351, wherein the Court held on Page 1001:

> "There is a proper procedure existing in Georgia law that can achieve Constitutional standards, i.e., a prior adversary judicial proceeding before the seizure of the allegedly obscene items."

FOOTNOTE 3:

> As examples, the following are presented: *** An order to show cause why the alleged obscene film is not obscene could be served on the possessor: ***.

This type of procedure was approved in *Metzger v. Pearcy*, 393 Fed. 2d 202 (7th Circuit 1968); *Tyrone v. Wilkinson*, 410 Fed. 2d 639 (4th Circuit 1969); *Bethview v. Kahn*, 416 Fed. 2d 410.

In each of the latter cases the Courts ordered the return of the alleged obscene material seized because no adversary hearing was held prior to the seizure of such materials. However, it is significant to note that the pos-

sessor was ordered to make one print available to the State for prosecution purposes.

The procedure employed in the case at bar was approved by the Supreme Court of Georgia in the cases of *1024 Peachtree Corporation, et al v. Slaton*, 228 Ga. 102, 184 S.E.2d 144; *Walters v. Slaton*, 227 Ga. 676, 182 S.E.2d 464 (four cases); *Evans Theatre Corporation v. Slaton*, 227 Ga. 377, 180 S.E.2d 712.

The cases relied upon by the Petitioners are clearly distinguishable from the case at bar. The vice of *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, is not found in the Georgia procedure. The Constitution for the State of Georgia (2-115) provides:

> "Liberty of speech or of the press guaranteed — no law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments, on all subjects being responsible for the abuse of that liberty."

The foregoing section of the Georgia Constitution was construed and fully explained in *K. Gordon Murray Productions v. Floyd*, 217 Ga. 784, 125 S.E. 2d 207 (1962).

*Freedman* involved a Board of Censors. The statute provides that it shall be unlawful to exhibit any motion picture film until the film has been submitted to and approved by the Maryland State Board of Censors.

The Chicago Motion Picture Ordinance involved in *Teitel Film Corporation v. Cusack*, 390 U.S. 139, 88 S.Ct. 754, prohibits the exhibition in any public place of "any picture . . . without having first secured a permit therefor from the Superintendent of Police." If the permit was de-

nied, the burden was on the Exhibitor to pursue the case through a series of Appeal Boards, all the while the picture could not be exhibited.

The same evil was found in *U.S. v. The Book Bin,* 306 Fed. Supp. 1023, affirmed 400 U.S. 410.

The precise question of whether or not obscenity can be controlled by injunction is not new to this Court, and has been decided adversely to Petitioner's contentions. In *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1956), this Court upheld the constitutionality of a New York statute authorizing the injunction of obscene prints and articles by the Supreme Court of New York, without a jury, upon the complaint of the chief executive or legal officer of any city, town or village. In said decision this Court stated:

> "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. See *Tigner v. Texas,* 301 U.S. 141, 148. If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies."

The procedure involved in the adversary hearing process employed in this case is fully protective of the Constitutional rights of the Exhibitors: No restraint whatsoever is placed upon the exhibition of the motion picture film involved until after a hearing is had thereon and the

sessor was ordered to make one print available to the State for prosecution purposes.

The procedure employed in the case at bar was approved by the Supreme Court of Georgia in the cases of *1024 Peachtree Corporation, et al v. Slaton*, 228 Ga. 102, 184 S.E.2d 144; *Walters v. Slaton*, 227 Ga. 676, 182 S.E.2d 464 (four cases); *Evans Theatre Corporation v. Slaton*, 227 Ga. 377, 180 S.E.2d 712.

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> "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. See *Tigner v. Texas*, 301 U.S. 141, 148. If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies."

The procedure involved in the adversary hearing process employed in this case is fully protective of the Constitutional rights of the Exhibitors: No restraint whatsoever is placed upon the exhibition of the motion picture film involved until after a hearing is had thereon and the

Courts have determined its obscenity. Until such judicial determination, the Exhibitors are free to continue exhibiting the film or films as was done in this case.

The Supreme Court of Georgia found the films to be obscene because they are obscene.

**4. WHETHER THE DISPLAY OF ANY SEXUALLY ORIENTED FILMS IN A COMMERCIAL THEATRE, WHEN SURROUNDED BY NOTICE TO THE PUBLIC OF THEIR NATURE AND BY REASONABLE PROTECTION AGAINST EXPOSURE OF THE FILM TO JUVENILES IS CONSTITUTIONALLY PROTECTED?**

This Court requested the parties in this case to brief in argument the foregoing question in addition to the other questions presented in the Petition for the Writ of Certiorari.

Apparently the question was paraphrased and formulated upon the following portion of the Trial Court's Order:

> "It appears to the Court that the display of *these films* in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of *these films* to minors, is constitutionally permissible." (Emphasis Added).

It should be noted that the Order of the Court made reference specifically to "these films" which are the subject matter of this litigation wherein the question propounded by this Court to be briefed and argued is directed

to "any sexually oriented film". Therefore, for this limited purpose, the words "any sexually oriented film" must be construed to mean obscene films within the definition of *Roth-Memoirs*, otherwise no constitutional issue would be raised.

It should also be noted for the purpose of this argument that the question makes no reference to the "pandering" requisite enumerated in *Redrup v. New York*, 386 U.S. 767, 18 L Ed. 2d 515, 87 S.Ct. 1414 to be considered in borderline cases.

The question as posed follows closely the language used in the report of the Commission on Obscenity and Pornography which relates to "any sexually oriented film or material" which embraces the spectrum of hard-core pornography including sexual intercourse, sodomy and fellatio between human beings and horses, donkeys, dogs and pigs to the borderline *Redrup* material. Therefore the seriousness of this question cannot be stressed strongly enough.

This issue has been raised several times in the lower Courts and in the Appellate Courts either as an extension of the *Stanley Doctrine* or upon the misguided interpretation of *Redrup*, with no lasting success. The Trial Court apparently based its findings upon the thoroughly discredited and totally rejected recommendations and findings of the Commission on Obscenity and Pornography.

To answer the question as propounded affirmatively would, in effect, adopt the Commission report and repeal all Federal, State and local legislation prohibiting the sale, exhibition or distribution of obscene sexual materials to adults which the United States Senate categorically refused to do.

The Supreme Court of Georgia, when ruling on this case addressed itself to this question (which included the pandering element) and held:

> "Appellees contend, and the judge of the superior court found that, inasmuch as the evidence in this case shows that the films which the solicitor seeks to seize are shown in a theater which carries on the front thereof the warning that it is for adults only and that "You must be 21 and able to prove it. If viewing the nude body offends you — PLEASE DO NOT ENTER," the exhibition of the films in this context is permissible and that the State cannot, without violating first amendment rights, constitutionally prohibit it. They rely in support of this position upon the case of *Stanley v. Ga.*, 394 U.S. 557, and other Federal and State cases following it. That case, however, is not authority for the position which appellees take. It dealt, not with the commercial distribution of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films. In one of the most recent, if not *the* most recent, case decided by the Supreme Court of the United States dealing with this kind of material that court has expressly limited the scope of Stanley and has thereby effectively answered this contention of the appellees. *U. S. v. Reidel*, 402 U.S. 351, 28 L.Ed. 2d 813, 91 S. Ct. 1410. That case involved the distribution through the mails of an admittedly obscene publication in violation of 18 U.S.C. §1461. The material was mailed to recipients who responded to a newspaper advertisement which required the recipient to state in his order therefor that he was 21 years of age. Reidel was indicted, but the trial court

granted his motion to dismiss the indictment and, upon review, the Supreme Court, in reversing that judgment, reiterated the ruling in *Roth v. U. S.*, 354 U.S. 476, 1 L.Ed 2d 1498, 77 S. Ct. 1304, that "obscenity is not within the area of constitutionally protected speech or press." In so ruling, the Supreme Court expressly held that the government could constitutionally prohibit the distribution of obscene materials through the mails, even though the distribution be limited to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in *Stanley*, does not carry with it the right to sell and deliver such material. As we view the holding in the *Reidel* case, it is dispositive of the appellees' contention, and the ruling of the trial court that the showing of these films in a commercial theater under the circumstances shown in this case is constitutionally permissible. The defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theater and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass through the front door of the defendant's theater and purchase a ticket to view the films and who certify thereby that they are more than 21 years of age are willing recipients of the material in the same legal sense as were those in the *Reidel* case, who, after reading the newspaper advertisements of the

material, mailed an order to the defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the first amendment."

The Supreme Court of Alabama in the case of *McKinney v. Alabama*, ____Ala.____, 254 So. 2d 714 in dealing with this question held:

"As their first point on appeal, appellants contend that by virtue of *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967), and the summary reversals based thereon, together with *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), they may engage in the commercial sale and distribution of obscene materials so long as there is no pandering, sale to minors, or an invasion of the privacy of others by their method of operation. Appellants are clearly in error. The United States Supreme Court's affirmances in *Milky Way Productions, Inc. v. Leary*, 305 F.Supp. 288 (S.D.N.Y. 1969), aff'd *New York Feed Co. v. Leary*, 397 U.S. 98, 90 S.Ct. 817, 25 L.Ed.2d 78 (1970), and *Gable v. Jenkins*, 309 F.Supp. 998 (N.D. Ga. 1969), aff'd 397 U.S. 592, 90 S.Ct. 1351, 25 L.Ed.2d 595 (both of which were decided subsequent to *Redrup* and *Stanley*), were affirmances of cases specifically holding that no additional tests for obscenity are required beyond the *Roth-Memoirs* standards. Shortly after appellant's brief was filed in this Court, the United States Supreme Court announced in *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971), that the

Court was renewing its adherence to *Roth* and sharply limiting its prior holding in *Stanley*."

The Supreme Court of Virginia reached the same conclusion in the case of *Price v. Commonwealth*, ____Va. ____, 189 S.E.2d 324.

The premise that the manner of distribution or dissemination was the controlling factor in obscenity cases, and not the obscene nature of the material itself blossomed from the misapplication and misconstruction of *Redrup v. New York*, 386 U.S. 767. *Redrup* was construed and explained in *Milky Way Productions, Inc. v. Leary*, 305 Fed. Supp. 288, 293 and was affirmed by this Court. 397 U.S. 98, 90 S.Ct. 817. On Page 293 the trial court held:

"(1) The main claim is that the definition of 'obscene' in § 235.00 (1) is invalid on its face because it embodies only the three 'tests' set out in *Memoirs v. Massachusetts*, 383 U.S. 413, 418, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), as derived from *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and intervening cases. Two more 'tests,' plaintiffs assert, were added by *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967) — that there be 'pandering' and 'foisting upon an unwilling public.'

"Plaintiffs misread the per curiam opinion in *Redrup*. As shown by the fuller opinions from which they derive, the supposedly additional, and allegedly essential, 'tests' are only *permissible* kinds of relevant evidence which may serve in a close case to tip the balance toward a finding of obscenity. The basic thought appears first in separate opinions of Chief Justice Warren. See *Roth* 354 U.S. at 495, 77 S.Ct. 1304 (concurring opinion); *Jacobellis v. Ohio*, 378 U.S. 184, 201, 84 S.Ct. 1676, 12 L.Ed.2d 793

(1964) (dissent). It takes firmer root in the opinion of Mr. Justice Brennan (joined by the Chief Justice and Mr. Justice Fortas), delivering the Court's judgment in *Memoirs, supra,* where he said (383 U.S. at 420, 86 S.Ct. at 978):

> 'On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, must justify the conclusion that the book was utterly without redeeming social importance."

It is therefore clear that the manner of dissemination of such materials is relevant only as permissible evidence to establish obscenity . . . It will not bring obscene material within First Amendment protection.

> Notwithstanding *Milky Way,* experience cautions that a misunderstanding of *Redrup* and *Stanley* has cast some of the Trial Courts adrift upon the seas of legal uncertainty.
>
> Perhaps the import of these decisions should now be transfixed by the harpoon of a clear and final decision by this Court.

In the case of *United States v. Reidel,* 91 S.Ct. 1410 (May 3, 1971), the case presented was whether § 1461 is constitutional as applied to the distribution of obscene materials to willing recipients who state that they are

adults. The District Court held that it was not constitutional and the Supreme Court disagreed and reversed that judgment stating:

"In *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), *Roth* was convicted under § 1461 for mailing obscene circulars and advertising. The Court affirmed the conviction, holding that 'obscenity is not within the area of constitutionally protected speech or press, id., at 485, 77 S.Ct. at 1309, and that § 1461, 'applied according to the proper standard for judging obscenity, do (does) not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.' Id., at 492, 77 S.Ct. at 1313. *Roth* has not been overruled. It remains the law in this Court and governs this case. *Reidel*, like *Roth*, was charged with using the mails for the distribution of obscene material. His conviction, if it occurs and the materials are found in fact to be obscene, would be no more vulnerable than was Roth's.

*Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969), compels no different result. There, pornographic films were found in *Stanley's* home and he was convicted under Georgia's statutes for possessing obscene material. This Court reversed the conviction, holding that the mere private possession of obscene matter cannot constitutionally be made a crime. But it neither overruled nor disturbed the holding in *Roth*. Indeed, in the Court's view, the constitutionality of proscribing private possession of obscenity was a matter of first impression in this

Court, a question neither involved nor decided in *Roth*. The Court made its point expressly: '*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.' Ibid. Nothing in *Stanley* questioned the validity of *Roth* insofar as the distribution of obscene material was concerned. Clearly the Court had no thought of questioning the validity of § 1461 as applied to those who, like *Reidel*, are routinely disseminating obscenity through the mails and who have no claim, and could make none, about unwanted governmental intrusions into the privacy of their home. The Court considered this sufficiently clear to warrant summary affirmance of the judgment of the United States District Court for the Northern District of Georgia rejecting claims that under *Stanley v. Georgia*, Georgia's obscenity statute could not be applied to book sellers. *Gable v. Jenkins*, 397 U.S. 592, 90 S.Ct. 1351, 25 L.Ed.2d 595 (1970).

The District Court ignored both *Roth* and the express limitations on the reach of the *Stanley* decision. Relying on the statement in *Stanley* that 'the Constitution protects the right to receive information and ideas *** regardless of their social worth.' 394 U.S. at 564, 89 S.Ct. at 1247, the trial judge reasoned that 'if a person has the right to receive and possess this material, then someone must have the right to deliver it to him.' He concluded that § 1461 could not be validly applied 'where obscene material is not directed at children, or it is not directed at an unwill-

ing public, where the material such as in this case is solicited by adults ***.'

The District Court gave *Stanley* too wide a sweep. To extrapolate from *Stanley's* right to have and peruse obscene material in the privacy of his own home a First Amendment right in *Reidel* to sell it to him would effectively scuttle *Roth*, the precise result that the *Stanley* opinion abjured. Whatever the scope of the 'right to receive' referred to in *Stanley*, it is not so broad as to immunize the dealings in obscenity in which *Reidel* engaged here — dealings which *Roth* held unprotected by the First Amendment.

The right *Stanley* asserted was 'the right to read or observe what he pleases — the right to satisfy his intellectual and emotional needs in the privacy of his own home.' 394 U.S. at 565, 89 S.Ct. at 1248. The Court's response was that 'a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thoughts of giving government the power to control men's minds.' Ibid. The focus of this language was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people like *Reidel* to distribute or sell obscene materials. The personal constitutional rights of those like *Stanley* to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution.

> *Reidel* is in a wholly different position. He has no complaints about governmental violations of his private thoughts or fantasies, but stands squarely on a claimed First Amendment right to do business in obscenity and use the mails in the process. But *Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today. *Stanley* did not overrule *Roth* and we decline to do so now."

The holding in *Roth v. U.S.* 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957) that "obscenity is not within the area of constitutionally protected speech or press" was reaffirmed by this Court in the case of *United States v. Reidel,* 402 U.S. 351, 28 L.Ed.2d 813, 91 S.Ct. 1490 in which case this Court held that obscenity and its *distribution* are outside the reach of the First Amendment.

*The question of distribution was met head-on and graphically answered by this Court in Reidel (Page 357) recognizing that the question addresses itself to the Legislative Branch of the government and not the Judiciary.* This Court held:

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and

the courts that basic reassessment is not only wise but essential. *This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances. Roth and like cases pose no obstacle to such developments."*

This is consistent with the decisions of this Court since 1887 when the Supreme Court ruled in the case of *Mugler v. Kansas*, 123 U.S. 623 (1887):

> "The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. *Under our system, that power is lodged in the legislative branch of the government.* It belongs to that department to exert what are known as police powers of the state, *and to determine primarily, what measures are appropriate or needful for the protection of the public morals,* the public health, or the public safety . . ." (Emphasis Added)

Petitioners rely heavily upon the final report of the Commission on Obscenity and Pornography and its findings, conclusions and recommendations. This report was transmitted to the President of the United States and the Congress on September 30, 1970, approximately 8 months before *U.S. v. Reidel* was decided. The report was immediately rejected and denounced by the House of Representatives (*Congressional Records-House*, H 9399,

H 9676, H 10203), and categorically rejected by the Senate (*Congressional Record-Senate* S 17466; S 17903; S 18182). It was described as a "Magna Carta for the pornographer-ludicrous and a fraud upon the American public."

On Page 107 of the Petitioner's brief it is stated,

> "It is further noted by the Commission on Obscenity and Pornography, law and law enforcement panel, at Page 43, 'A National survey of American public opinion sponsored by the Commission shows that a majority of American adults believed that adults should be allowed to rear or see any sexual materials they wish."

This is also the finding of the Commission.

A cursory examination of the Commission report itself clearly demonstrates that nothing is further than the truth.

In the section of the report entitled, The Impact of Erotica — Report of the Effects Panel to the Commission on Obscenity and Pornography, Section B, which is entitled, Public Opinion About Sexual Materials, appears the now infamous Abelson survey. The report states:

> "In 1970, a survey involving face-to-face interviews with a random sample of 2,486 adults and 769 young persons (ages 15 to 20) was conducted at the Commission's request (Abelson, et al., 1970). One of the purposes of the survey was to determine whether Americans regard and define the area of erotic materials as a significant or important social problem. Adult respondents in the survey were asked: "Would you please tell me what you think are the two or three most serious problems facing the country today?"

> Only 2% of the population referred to erotic materials, and many of these comments alluded to erotica through criticism of mass media or contemporary sexual standards. The most frequently mentioned problems were: war (54%), race (36%), the national economy (32%), youth rebellion (23%), breakdown of law and order (20%), drugs (20%), pollution and misuse of resources (19%), poverty and poverty programs (12%), moral breakdown (9%), and dissatisfaction with government (9%). About 4% of the population mentioned education, overpopulation, and foreign policy as serious problems, *and only 2% mentioned erotic materials.*

The report continues:

> "Opinion surveys sometimes appear to report contradictory findings, and the findings of the Commission study (Abelson, et al., 1970) may appear to be inconsistent with reports that 85% of the American adults "favor stricter laws on pornography" (*Gallup*, 1969) and that "76% want pornographic literature outlawed and 72% believe smut is taking the beauty out of sex." (*Harris*, 1969)

The report did not reflect on other data from the same survey 88% would prohibit sex scenes in movies when they were put there for entertainment.

To base the findings that "a majority of American adults believe that adults should be allowed to read or see any sexual materials they wish based upon the Abelson survey is indeed ludicrous and was so branded in the Congressional Record by the Senate.

Those who insist that they have an unqualified constitutional right to disseminate pornography in this country have no regard whatsoever for its injurious effect on the people and on future generations. The welfare of the people is secondary to the pornographer's First Amendment privilege they say.

This is clearly demonstrated by Thomas I. Emerson in his recently published book, *The System of Freedom of Expression*, which is quoted at length in Petitioner's brief. On Page 100 of Petitioner's brief Mr. Emerson observed, *"Erotic reading may be injurious in its long term effects. But no one contends that expression in any other area can be suppressed on such grounds. To do so would destroy the system of freedom of expression."* Emerson continues (Page 105, Petitioner's brief) *"In any event, as long as material is available to adults it is hopeless to try to keep it out of the hands of adolescents."*

The Commission confesses that time limitations prevented any adequate investigation of the long term effects of pornography — this after three years of alleged study and investigation. Then why the haste to in effect repeal all laws controlling the distribution of this filth?

In *Reidel* (Page 355) this Court observed that the Trial Judge reasoned that "if a person has a right to receive and possess this material, then someone must have the right to deliver it to him." He concluded that Section 1461 could not be validly applied "where obscene material is not directed at children, or is not directed at an unwilling public, where the material such as in this case is solicited by adults . . ."

Would it not follow then that if the display of any sexually oriented films in a commercial theatre when sur-

rounded by notice to the public of their nature and by reasonable protection against exposure of the film to juveniles is held to be constitutionally protected, all federal, state and local legislation prohibiting the sale, exhibition or distribution of sexual materials to consenting adults would be effectively repealed? *This would raise a most serious and grave problem that would ultimately destroy the very moral fiber of this country.* For would it not follow that if a person has the right — *the constitutionally protected right* — to exhibit obscene film in a commercial theatre to consenting adults then someone has the right to sell the film to the exhibitor; which envisions the right of someone to transport and distribute it; which envisions the right TO MANUFACTURE THE OBSCENE FILM. This is the next step.

Perhaps the Court will consider this as "stretching" the implications of such a ruling a little bit too far. But experience graphically demonstrates that pornographers will continue to hitch-hike through the sewers of filth on every inference; on every word; and on every syllable which affords transportation to them.

Unlike the printed text whose words are created in the minds of the authors, motion picture films are actual photographs of live, real people of all ages performing every debasing act that can be conceived in the minds of man — cunnilingus, fellatio, sodomy, homosexuality, lesbian activities and bestiality, which not only includes intercourse between a human and an animal, but now embraces fellatio between human females and animals, including horses, donkeys, dogs, and even pigs.

It would indeed be a strange *First Amendment* that would permit or sanction such activities with immunity

from prosecution for the sole benefit of the very few who make their living by coining the sewage from the cesspool of pornography.

What an inheritance this would be for our children and grandchildren.

IT IS IMPORTANT to emphasize here that the two 16-millimeter films involved in this case do not portray acts of bestiality in any form whatsoever — it is the use of the words *"any sexually oriented film"* in the question presented that embraces these acts. We do however insist that the films involved here are obscene within the meaning of the *Roth-Memoirs Test.*

President Nixon promptly responded to the recommendations and report of the Commission on Obscenity and Pornography and issued the following statement on October 24, 1970:

> "Several weeks ago, the National Commission on Obscenity and Pornography — appointed in a previous administration — presented its findings.
>
> I have evaluated that report and categorically reject its morally bankrupt conclusions and major recommendations.
>
> So long as I am in the White House, there will be no relaxation of the national effort to control and eliminate smut from our national life.
>
> The Commission contends that the proliferation of filthy books and plays has no lasting harmful effect on a man's character. If that were true, it must also be true that great books, great paintings, and great plays have no ennobling effect on a man's conduct.

Centuries of civilization and 10 minutes of common sense tell us otherwise.

The Commission calls for the repeal of laws controlling smut for adults — while recommending continued restrictions on smut for children. In an open society, this proposal is untenable. If the level of filth rises in the adult community, the young people in our society cannot help but also be inundated by the flood.

Pornography can corrupt a society and a civilization. The people's elected representatives have the right and obligation to prevent that corruption.

The warped and brutal portrayal of sex in books, plays, magazines, and movies, if not halted and reversed, could poison the wellsprings of American and Western culture and civilization.

The pollution of our culture, the pollution of our civilization with smut and filth is as serious a situation for the American people as the pollution of our once-pure air and water.

Smut should not be simply contained at its present level; it should be outlawed in every State in the Union. And the legislatures and courts at every level of American government should act in unison to achieve that goal.

I am well aware of the importance of protecting freedom of expression. But pornography is to freedom of expression what anarchy is to liberty; as free men willingly restrain a measure of their freedom to prevent anarchy, so must we draw the line against pornography to protect freedom of expression.

The Supreme Court has long held, and recently reaffirmed, that obscenity is not within the area of protected speech or press. Those who attempt to break down the barriers against obscenity and pornography deal a severe blow to the very freedom of expression they profess to espouse.

Moreover, if an attitude of permissiveness were to be adopted regarding pornography, this would contribute to an atmosphere condoning anarchy in every field — and would increase the threat to our social order as well as to our moral principles.

Alexis de Tocqueville, observing America more than a century ago, wrote: "America is great because she is good — and if America ceases to be good, America will cease to be great."

We all hold the responsibility for keeping America a great country — by keeping America a good country.

American morality is not to be trifled with. The Commission on Pornography and Obscenity has performed a disservice, and I totally reject its report. (*Weekly Compilation of Presidential Documents*, November 2, 1970, pp. 1454 & 1455.)

## CONCLUSION

The report of the Commission on Obscenity and Pornography was categorically rejected by the Congress and by the President of the United States. Eighty-five percent (85%) of the American adults favor stricter laws on pornography and seventy-six percent (76%) want pornographic literature outlawed. To use the report as a basis for opening wider the floodgate of pornography would be indeed tragic and an affront to the President, the Congress and the people of the United States.

The display of any sexually oriented films (obscene within the meaning of *Roth-Memoirs*) in a commercial theatre, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the film to juveniles is NOT constitutionally protected and such should be the pronouncement of this Court in no uncertain terms.

The Supreme Court of Georgia found the films here involved to be obscene — because they are obscene. The opinion and judgment of the Supreme Court of Georgia should be flat out affirmed.

Respectfully submitted,

Original Pen Signed By,

THOMAS E. MORAN, *Esquire*

Original Pen Signed By,

JOEL M. FELDMAN, *Esquire*

OF COUNSEL:

Original Pen Signed By,

THOMAS R. MORAN, *Esquire*

## CERTIFICATE OF SERVICE

This is to certify that I have this day served Counsel for Petitioners with two (2) copies each of the within and foregoing *Respondents' Brief* by mailing the same, postage prepaid, to:

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All parties required to be served have been served.

This the 26th day of SEPTEMBER, 1972.

Original Pen Signed By

JOEL M. FELDMAN, *Esquire*
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